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IN THE

Supreme Court of the United States

October Term, 1968
No. 1188

NORMA C. DIRIC,
Petitioner,

v.

IMMIGRATION & NATURALIZATION SERVICE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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IN THE

Supreme Court of the United States

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No. .....

NORMA C. DIRIC,
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v.

IMMIGRATION & NATURALIZATION SERVICE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Ninth Circuit entered in this case on September 19, 1968, and its judgment entered on October 30, 1968, denying petition for re-hearing.

CITATIONS TO OPINIONS BELOW

The decisions of the special inquiry officer are unreported and are printed in Appendix B hereto, *infra*, pp. 5-8, 13-14. The decision of the Board of Immigration Appeals is unreported and is printed in Appendix B hereto,

infra, pp. 9-12. The opinion of the Circuit Court of Appeals is printed in Appendix B hereto, *infra*, pp. 15-21, and is reported in 400 F.2d 658.

JURISDICTION

The judgment of the Court of Appeals was entered on September 19, 1968. Re-hearing was denied on October 30, 1968. Mr. Justice Douglas, by Order dated January 23, 1969, granted a petition to extend the time for filing the writ of certiorari to March 28, 1969. The jurisdiction of this court is invoked under 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED

1. Whether an order of deportation and a denial of eligibility for voluntary departure of a non-immigrant student is the result of a fair hearing based on clear, unequivocal and convincing evidence where such order is based, in part, on hearsay, unsworn statements, and statements taken without notice to the alien and where the hearing is marked by abusiveness and misconduct of government counsel toward the non-immigrant student who is not represented by counsel.

2. Whether failure of the special inquiry officer to warn a non-immigrant student at a deportation hearing of her rights under the Fifth Amendment to the Constitution of the United States violated her rights where she was not represented by counsel and where both government counsel and the special inquiry officer asked repeated questions of incriminating nature concerning criminal acts.

STATUTES INVOLVED

The statutory provisions involved are: Immigration and Nationality Act of June 27, 1952, as amended; Sec. 241 (a)(2), 8 U.S.C. Sec. 1251(a)(2); Sec. 242(b), 8 U.S.C. Sec. 1252(b); Sec. 244(e), 8 U.S.C. Sec. 1254(e); and 28 U.S.C. 1254(e). They are printed in Appendix A, *infra*, pp. 1-4.

STATEMENT

Norma C. Diric, the petitioner, entered the United States at Anchorage, Alaska, on June 24, 1965. She was admitted as a non-immigrant student, and was authorized to remain in the United States until June 15, 1966. Petitioner is a native and citizen of the Republic of the Philippines and a registered nurse in the Philippines (R. 1, 3, 12).

For a time after her arrival, petitioner enrolled in the Seattle Dental Assistant and Technician School. She also took a course of instruction at the St. Joseph's School of Nursing in Tacoma where she was advised to obtain practical training in psychiatric nursing. Petitioner contacted an immigration officer in Seattle, telling him she wanted to take training in psychiatric nursing (R. 8, 9, 11). She was told to file an application, but action on the application was withheld. Petitioner was then told by the immigration officer that he was going to recommend denial of her application for practical training and he advised her to request permission to work providing she complete a "245 application" (R. 18-20). The transcript is silent as to whether the immigration officer advised petitioner to apply for an extension of stay although it

appears there were numerous consultations between petitioner and this officer (R. 18-20). Miss Diric then went to work at two nursing homes in Seattle where she was employed at the time of the hearing and still is employed (R. 11).

On October 11, 1966, the District Director of the Immigration and Naturalization Service in Seattle issued an Order to Show Cause alleging petitioner had remained in the United States longer than authorized and was therefore deportable under the provisions of 8 U.S.C., Sec. 1251(a)(2) (R. 1). The deportation proceeding opened in Seattle on October 20, 1968, petitioner not being represented by counsel. She was not advised that anything she said could be used against her or that she had a right to refuse to answer incriminating or degrading questions (R. 2).

After the service had rested its case for a second time at the hearing of October 20, 1968, the special inquiry officer adjourned to allow petitioner to apply for a "245 relief" and pay the fee (R. 25).

The hearing resumed on December 12, 1966, petitioner again not being represented, and no further explanation of rights being given her (R. 26). On December 15, 1966, the special inquiry officer found petitioner had not shown herself to be a person of good moral character and had not established eligibility for voluntary departure. He ordered denial of her application for adjustment of status and ordered her deported to the Republic of the Philippines (App. B, p. 8).

Miss Diric obtained counsel who moved to re-open proceedings. This motion was denied on January 23,

1967 (App. B, pp. 13-14). An appeal of the order denying motion to re-open was taken to the Board of Immigration Appeals which on May 5, 1966, dismissed the appeal (App. B, pp. 9-12). An appeal of the dismissal by the Board of Immigration Appeals was then taken to the United States Circuit Court of Appeals for the Ninth Circuit which affirmed the Board and denied petitioner a rehearing. In so doing, however, the majority opinion reprimanded trial counsel for failure to call witnesses and for "short-cutting" in presenting testimony (Appx. C, p. 18). Circuit Judge Ely in his concurring opinion condemned the trial attorney in much stronger terms (Appx. C, p. 21).

SPECIFICATION OF ERRORS TO BE URGED

The Court of Appeals Erred:

1. In failing to rule on whether petitioner received a fair hearing based on clear, unequivocal and convincing evidence.

2. In holding that petitioner was not denied due process under the Fifth Amendment to the United States Constitution.

REASONS FOR GRANTING WRIT

1. The decision of the Court of Appeals is believed to be in conflict with its decisions in *McConney v. Rogers,* 287 F.2d 473 (C.C.A. 9-1961) and *Kovac v. Immigration and Naturalization Service,* United States Court of Appeals for Ninth Circuit, No. 21913, decided January 29, 1969. In the *McConney Opinion,* Judge Hamley held the petitioner did not receive a fair hearing and voided a de-

portation order where no notice was given petitioner of the taking of a deposition. Judge Hamley stated that since petitioner was not represented by counsel at the hearing his failure to object to the introduction of deposition should have been disregarded by the special inquiry officer (p. 476). In the recent *Kovac* case, *supra*, petitioner "jumped ship" and conceded he was deportable. He was not represented by counsel at the deportation hearing and his motion to reopen and re-consider so that he could present evidence of persecution in his native Yugoslavia was denied. In remanding for further proceedings, Judge Browning wrote that it was important that the petitioner be allowed to present his proofs "for the stakes are high."

In the instant case, an affidavit taken from one Ward E. McLean was admitted in evidence by the special inquiry officer without the trial attorney showing Mr. McLean was not available and without the petitioner being afforded the right to cross-examine Mr. McLean. Neither was there notice given to petitioner of when and where the affidavit was to be taken (R. 11, 12). In its opinion, the court below stated it did not approve this type of proceeding, but it did not feel this denial of petitioner's rights was controlling (Appx. C, p. 18). This appears to be a direct conflict with the decisions of the same court in *McConney* and *Kovac, supra.*

Not only does this case appear to be in conflict with other decisions from the same Circuit, it also appears to be in conflict with the Seventh Circuit Court of Appeals decision in *U.S. v. Holton*, 222 F.2d 840 (7-CCA-1955). There, an order of deportation was based on hearsay

testimony concerning Communist party activities. Circuit Judge Major wrote that hearsay testimony has no more probative value than "tattlings from a town meeting" and that this evidence did not meet the strict standard required by Congress in a deportation proceeding (p. 844).

In this case, the special inquiry officer admitted into evidence a letter from one Fay S. Schwalm and a letter signed by an Augustine P. Diric addressed to petitioner which had been stolen from her suitcase (R. 32-33). A letter from petitioner's older sister to her aunt in Seattle was offered and admitted despite an objection by petitioner (R. pp. 40-41). The contents of these letters seriously compromised petitioner's character and morals and undoubtedly were relied upon by the special inquiry officer in his decision. When petitioner moved for a rehearing to rebut the devastating hearsay and unsworn letters concerning her morals and character, the special inquiry officer summarily denied the motion and sidestepped her request (Order of January 23, 1967; App. B, pp. 13-14).

Judge Ely characterized the conduct of the government's trial attorney at the deportation hearings as overzealous, unnecessarily unkind and abusive (Appx. C, p. 21). In oral argument before the Ninth Circuit Court, he appropriately characterized the hearings as a "kangaroo procedure." The question asked of petitioner by trial counsel at page 42 of the Record clearly shows what Judge Ely undoubtedly had in mind:

Trial attorney to respondent:

"Q. Now, Miss Diric, your aunt and uncle requested that they be present—given an opportunity to

testify concerning the differences of opinion that arose during the time you stayed at their house. They have told me that they will testify substantially to the fact that your parents wanted you to leave the Philippine Islands because you were living with this married man, and that they arranged to pay your transportation and to bring you to the United States and enroll you in this dental school, not because you needed the dental training, because you were already a nurse, but because this was the only way they could think to bring you in, and that they did this, but that shortly after you arrived here you became interested in a married man here, namely, Mr. McLean, and that thereafter you came and went and you didn't stay home and you became unhappy in their house, and that you became more or less unmanageable, and then eventually your aunt and uncle were called away because of an emergency and that upon their return the neighbors told them that you had had some man in the house while they were gone, and that when they attempted to question you about this you moved out and moved into the McLean home and that they disapproved very, very strenuously of your attitude and the way you were acting, and so they complained to the Immigration Service. Now, is there anything in that testimony you dispute?"

This is but one example of the type of questions to which petitioner was submitted during both hearings. If Miss Diric is to be deprived of her liberty and deported, the order of deportation should stand on clear, unequivocal and convincing evidence as required by *Woodby v. Immigration and Naturalization Service*, 385 U.S. 276, 87 S. Ct. 483, 17 L.ed.2d 362 (1966), and should meet "essential standards of fairness." *Bridges v. Wixon*, 326 U.S. 135, 89 L.ed. 203, 66 S. Ct. 1416 (1945).

If the decision of the court below is upheld by a denial of this petition, the case will then be authority for the proposition that even though an alien in a deportation proceeding is denied a fair hearing, such denial will not void an order of deportation if the government makes out a *prima facie* case for deportability.

2. Petitioner raised a serious constitutional question before the special inquiry officer in the petition for rehearing, before the Board of Immigration Appeals and in the court below. She claimed her rights under the Fifth Amendment to the United States Constitution were infringed because the special inquiry officer allowed questions seeking to elicit testimony of an incriminating and degrading nature although petitioner had not been given a warning in keeping with the requirements of *Miranda* v. *Arizona*, 384 U.S. 436 (1966). While not denying that the warning required by the *Miranda* case was not given, the court below held that:

> "This was not a *Miranda*-type of questioning; petitioner was not in custody and no criminal proceedings were involved. We find nothing in *Miranda* or its progeny which would apply its exclusionary rule to deportation hearings." (Appx. C, p. ....).

There is no question that petitioner's freedom of action was curtailed in the setting in which she found herself before the special inquiry officer on October 20 and December 12, 1966. She was not free to ignore the questions of either the trial attorney or of the special inquiry officer who took over the questioning on several occasions. One does not have to speculate on what would have happened to Miss Diric had she attempted to walk out of the hearing or had refused to answer questions concerning alleged

criminal conduct in both the Philippine Islands and the United States. She was, in the words of Mr. Justice Douglas, "between the rock and the whirlpool" and was subjected to coarse, unkind and, on occasion, vulgar questioning as the entire record shows. *Garrity v. New Jersey,* 385 U.S. 493, 17 L.ed.2d 562, 87 S.Ct. 616 (1967). The choice given her was incrimination and degradation or deportation.

While in a technical sense the court below was correct in stating the petitioner was "not in custody and no criminal proceedings were involved" this legal hairsplitting should not be allowed to stand where a basic constitutional safeguard is at issue. Mr. Justice Murphy's language in *Bridges v. Wixon, supra,* is appropriate:

> "It is no answer that a deportation proceeding is technically non-criminal in nature and that a deportable alien is not adjudged guilty of a "crime" . . . The impact of deportation upon the life of an alien is often as great, if not greater, than the imposition of a criminal sentence . . . There is, thus, no justifiable reason for discarding the democratic and humane tenents of our legal system and descending to the practices of despotism in dealing with deportation." (p. 163)

To allow the decision of the court below to stand will unduly restrict the constitutional safeguards of all persons. This court should grant this writ to make clear that aliens in deportation hearings do have constitutional safe guards guaranteeing their personal rights and that when these safeguards are abused and denied, new hearings will be ordered.

CONCLUSION

For the reasons stated, this petition for a writ of certiorari should be granted.

Respectfully submitted,

MYRON L. BORAWICK
Attorney for Petitioner

APPENDIX A

STATUTORY PROVISIONS CITED

Immigration and Nationality Act, Sec. 242(b); 8 U.S.C. U.S.C. 1251(a)(2):

> "Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who—
>
> "(2) entered the United States without inspection or at any time or place other than as designated by the Attorney General or is in the United States in violation of this chapter or in violation of any other laws of the United States;"

Immigration and Nationality Act, Sec. 242(b); 8 U.S.C. 1252(b):

> "b) A special inquiry officer shall conduct proceedings under this section to determine the deportability of any alien, and shall administer oaths, present and receive evidence, interrogate, examine, and cross-examine the alien or witnesses, and, as authorized by the Attorney General, shall make determinations, including orders of deportation. Determination of deportability in any case shall be made only upon a record made in a proceeding before a special inquiry officer, at which the alien shall have reasonable opportunity to be present, unless by reason of the alien's mental incompetency it is impracticable for him to be present, in which case the Attorney General shall prescribe necessary and proper safeguards for the rights and privileges of such alien. If any alien has been given a reasonable opportunity to be present at a proceeding under this section, and without reasonable cause fails or refuses to attend or remain in attendance at such proceeding, the special inquiry officer may proceed to a determination in like manner as if the alien were present. In any case or

class of cases in which the Attorney General believes that such procedure would be of aid in making a determination, he may require specifically or by regulation that an additional immigration officer shall be assigned to present the evidence on behalf of the United States and in such case such additional immigration officer shall have authority to present evidence, and to interrogate, examine and cross-examine the alien or other witnesses in the proceedings. Nothing in the preceding sentence shall be construed to diminish the authority conferred upon the special inquiry officer conducting such proceedings. No special inquiry officer shall conduct a proceding in any case under this section in which he shall have participated in investigative functions or in which he shall have participated (except as provided in this subsection) in prosecuting functions. Proceedings before a special inquiry officer acting under the provisions of this section shall be in accordance with such regulations, not inconsistent with this chapter, as the Attorney General shall prescribe. Such regulations shall include requirements that—

(1) the alien shall be given notice, reasonable under all the circumstances, of the nature of the charges against him and of the time and place at which the proceedings will be held;

(2) the alien shall have the privilege of being represented (at no expense to the Government) by such counsel, authorized to practice in such proceedings, as he shall choose;

(3) the alien shall have a reasonable opportunity to examine the evidence against him, to present evidence in his own behalf, and to cross-examine witnesses presented by the Government; and

(4) no decision of deportability shall be valid unless it is based upon reasonable, substantial, and probative evidence.

The procedure so prescribed shall be the sole and exclusive procedure for determining the deportability

of an alien under this section. In any case in which an alien is ordered deported from the United States under the provisions of this chapter, or of any other law or treaty, the decision of the Attorney General shall be final. In the discretion of the Attorney General, and under such regulations as he may prescribe, deportation proceedings, including issuance of a warrant of arrest, and a finding of deportability under this section need not be required in the case of any alien who admits to belonging to a class of aliens who are deportable under section 1251 of this title if such alien voluntarily departs from the United States at his own expense, or is removed at Government expense as hereinafter authorized, unless the Attorney General has reason to believe that such alien is deportable under paragraphs (4)-(7), (11), (12), (14)-(17), or (18) of section 1251(a) of this title. If any alien who is authorized to depart voluntarily under the preceding sentence is financially unable to depart at his own expense and the Attorney General deems his removal to be in the best interest of the United States, the expense of such removal may be paid from the appropriation for the enforcement of this chapter."

Immigration and Nationality Act, Sec. 244(e); 8 U.S.C. Sec. 1254(e):

"(e) The Attorney General may, in his discretion, permit any alien under deportation proceedings, other than an alien within the provisions of paragraph (4), (5), (6), (7), (11), (12), (14), (15), (16), (17), (18) of section 1251(a) of this title (and also any alien within the purview of such paragraphs if he is also within the provisions of paragraph (2) of subsection (a) of this section), to depart voluntarily from the United States at his own expense in lieu of deportation if such alien shall establish to the satisfaction of the Attorney General that he is, and has been, a person of good moral character for at least five years immediately preceding his application for voluntary departure under this subsection."

28 U.S.C. Sec. 1254(1):

"Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

"(1) By writ of certiorari granted upon a petition of any party to any civil or ciminal case, before or after rendition of judgment or decree; . . ."

APPENDIX B

UNITED STATES DEPARTMENT OF JUSTICE
Immigration and Naturalization Service

File: A13-772-214 - Seattle, Washington

In The Matter Of NORMA CALAUTIT DIRIC Respondent	IN DEPORTATION PROCEEDINGS

CHARGES:

I & N Act - Section 241(a)(2) - Remained longer than permitted - student.

APPLICATION: Adjustment of status, Section 245, I & N Act; voluntary departure, Section 244(e), I & N Act.

IN BEHALF OF RESPONDENT:
Pro Se.

IN BEHALF OF SERVICE:
B.G. Greenwald
Trial Attorney
Seattle, Wash.

DECISION OF THE SPECIAL INQUIRY OFFICER

The respondent is a 29-year-old single female, who concedes, as alleged in the order to show cause that she is not a citizen or national of the United States but a native and citizen of the Philippines. She entered the United States at Anchorage, Alaska June 24, 1965 as a nonimmigrant student authorized to remain in the United States until June 15, 1966. Prior to coming to the United States the respondent was a graduate nurse in the Philippines and had worked as a nurse there. She came to the United States for the purpose of attending a dental assistant and technician school. She finished that course

December 17, 1965 and was granted permission for practical training until June 15, 1966. At the time of her hearing, October 20, 1966, she had not accomplished any practical training, nor did she have a promise of a job for that purpose. She started working without permission January 22, 1966 for the Stubbing's Nursing Home in Seattle, Washington. On January 31, 1966 the District Director notified her that she must affect her departure on or before February 15, 1966. This was subsequently extended to June 15, 1966. The respondent did not depart from the United States at the expiration of that period. It is clear from the evidence that she has remained in the United States for a longer period than permitted as a student. She has designated the Philippine Islands as the country to which she wishes to go in the event she is deported from the United States.

The respondent applied for adjustment of her status under the provisions of Section 245 of the Immigration and Nationality Act during her resumed hearing December 12, 1966. Section 245 of the Immigration and Nationality Act permits the Attorney General, in his discretion, to adjust the status of an alien, with certain exceptions not material herein, to that of an alien lawfully admitted for permanent residence if the alien makes an application for adjustment of status, is eligible to receive an immigrant visa, and is admissible to the United States for permanent residence, provided, that an immigrant visa is immediately available to the applicant at the time the application is approved.

The respondent is unable to meet the initial requirement of the law as an alien eligible to receive an im-

migrant visa. She is attempting to qualify under the third preference of the Philippine quota as a nurse. The third preference of the Philippine quota is unavailable and has been exhausted since September 15, 1966 according to the Visa Office Bulletin of November 15, 1966. The respondent therefore can not satisfy the statutory requirements. Moreover, the respondent's application for adjustment of status to that of a permanent resident would not be granted as a matter of discretion had she been able to meet the statutory provisions of the Act, because she was not a bona fide nonimmigrant at the time of her admission. She completed sixteen years education in the Philippines prior to her departure and was qualified as a medical nurse. She obtained her visa to come to the United States in the guise of a student dental technician, a position with much lower professional qualifications. After she completed her course she failed to take the practical training but immediately went to work as a nurse and before the expiration of six months she had abandoned the idea of becoming a dental technician and embarked upon a course of action which would eventually give her a nurse's license in the State of Washington with the intention of remaining in the United States permanently. In addition, she became emotionally involved with a married man who was the administrator of the Stubbing's Nursing Home where she worked. Prior to coming to the United States she lived out of wedlock with a married man in the Philippines, and after becoming pregnant had an abortion.

On the basis of the entire record the respondent's case would not be one which merits the relief she seeks assuming that she could meet the statutory qualifications.

Her application is denied. She has not established statutory eligibility for voluntary departure because she has not satisfied the burden imposed upon her by statute to show that she has been for the past five years a person of good moral character. Under the circumstances, an order of deportation will be entered.

ORDER: It is ordered that the respondent's application for adjustment of status under the provisions of Section 245 of the Immigration and Nationality Act be denied.

IT IS FURTHER ORDERED that the respondent be deported from the United States to the Republic of the Philippines on the charge contained in the order to show cause.

John W. Keane
Special Inquiry Officer

UNITED STATES DEPARTMENT OF JUSTICE
Board of Immigration Appeals

File: A-13772214 - San Francisco

In re: NORMA CALAUTIT DIRIC Respondent	IN DEPORTATION PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT:

M. L. Borawick, Esq.
Puget Sound Natl. Bank Bldg.
Midway, Washington 98042
(Counsel submitted brief in lieu of oral argument)

ON BEHALF OF I&N SERVICE:

B. G. Greenwald, Esq.
Trial Attorney
(Brief filed)

CHARGES:

Order: Section 241(a)(2), I&N Act (8 U.S.C. 1251)
Remained longer than permitted—student

Lodged: None

APPLICATION: Motion to reopen

The respondent, a native and citizen of the Philippines, has been ordered deported as an alien who after admission as a student has remained longer than permitted (Section 241(a)(2) of the Immigration and Nationality Act; 8 U.S.C. 1251(a)(2)). An order entered by the special inquiry officer on December 15, 1966 provides for

the respondent's deportation to the republic of the Philippines on the charge stated in the Order to Show Cause and denied the respondents' application for adjustment of status under the provisions of Section 245 of the Immigration and Nationality Act. The special inquiry officer also found that the respondent had not established her eligibility for voluntary departure for the reason that she has not been a person of good moral character for the preceding five years.

The respondent did not appeal the decision of the special inquiry officer within the time granted her. A motion to reconsider the action taken by the special inquiry officer was submitted on behalf of the respondent on January 13, 1967. The special inquiry officer in an order dated January 23, 1967 denied the motion to reopen and to reconsider his order of December 15, 1966. The respondent appeals from this order.

The respondent, an unmarried female alien, last entered the United States through the port of Anchorage, Alaska on June 24, 1965. She was admitted as a nonimmigrant student authorized to remain in the United States until June 15, 1966. The evidence of record affirmatively establishes the respondent's deportability as charged in the Order to Show Cause.

Counsel contends in his motion that the order of deportation should be reversed and the relief sought by the respondent, namely, an adjustment of her immigration status to that of a permanent resident alien, should be granted. Counsel also maintains in his motion that the respondent was not accorded a fair hearing; that she was not represented by counsel; that her waiver of counsel is

not effective and that the special inquiry officer's finding that the respondent was not a bona fide nonimmigrant at the time of her admission has no support in the record.

We have carefully reviewed the record in light of the issues raised by counsel. We find nothing in the record which supports the contention of counsel that the respondent was not accorded a fair hearing. The hearing complies in all respects with 8 C.F.R. 242, the regulations which govern a hearing in deportation proceedings. The respondent was advised of her right to be represented by counsel of her own selection and at her expense and she declined to exercise her right (p. 2).

We find no substance to counsel's claim that the special inquiry officer erred in considering evidence of the respondent's moral character in connection with her application for an adjustment of status. The burden is always upon the applicant to establish that an application for adjustment of status merits favorable action. The record shows that the respondent was offered an opportunity to challenge the evidence introduced by the Government concerning her moral character (p. 47).

Counsel contends that the respondent's application for adjustment of status should not have been denied on the ground that an immigration visa is not immediately available to her. Counsel maintains that he has been advised that the Philippine quota is usually open in the third preference category. According to Visa Bulletin No. 171 dated April 17, 1967, visas under the Philippine quota have been entirely allocated for this fiscal year and the third preference under the quota has a priority date of November 1, 1966. Under the circumstances no purpose

would be served in reopening the proceeding to permit further application for relief under Section 245 of the Immigration and Nationality Act.

We affirm the conclusion of the special inquiry officer that voluntary departure is not warranted on this record and no purpose would be served in reopening the proceeding to permit further application for relief under Section 244(e) of the Immigration and Nationality Act (8 U.S.C. 1254(e). The appeal will be dismissed.

ORDER: It is directed that the appeal be and the same is hereby dismissed.

Acting Chairman.

UNITED STATES DEPARTMENT OF JUSTICE
Immigration and Naturalization Service

File A13-772-214—Seattle, Washington

In The Matter of NORMA CALAUTIT DIRIC *Respondent*	IN DEPORTATION PROCEEDINGS

CHARGES:

I&N Act—Section 241(a)(2)—Remained longer than permitted—student.

APPLICATION: Motion to reopen proceedings.

IN BEHALF OF RESPONDENT:

M. L. Borawick, Attorney
Puget Sound National Bank Bldg.
Midway, Washington 98042

IN BEHALF OF SERVICE:

B. G. Greenwald
Trial Attorney
Seattle, Wash.

DECISION ON MOTION TO REOPEN

The respondent is a 29-year-old single female, who was ordered deported on December 15, 1966 after conceding deportability as alleged in the order to show cause. She applied for adjustment of status under Section 245 of the Immigration and Nationality Act, which was denied on the ground that she was not eligible to receive an immigrant visa and that she had not affirmatively established good moral character for the past five years. It was also pointed out in the decision that hers was not a case which

merited the favorable exercise of discretion because she used the nonimmigrant student route to enter the United States and remain permanently. Counsel now moves for reopening of the deportation proceedings and for reconsideration.

Current regulations provide that "a motion to reopen deportation proceedings shall not be granted unless it appears that evidence sought to be offered is material and was not available and could not have been discovered or presented at the former hearing."[1] The respondent's motion does not include such a showing. Assuming that the respondent has additional evidence to submit which counsel discusses in his motion, the respondent would not meet the statutory requirements for adjustment of status under Section 245 in that she was not eligible for a visa at the time her application was considered.

ORDER: It is ordered that the motion to reopen and reconsider the proceedings in the respondent's case be denied.

JOHN W. KEANE
Special Inquiry Officer

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1. 8 C.F.R. 242.22.

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

NORMA C. DIRIC, *Petitioner,* v. IMMIGRATION & NATURALIZATION SERVICE, *Respondent.*	No. 22,100

[September 19, 1968]

On Petition for Review of an Order of the Immigration and Naturalization Service

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Before: CHAMBERS, HAMLIN and ELY, Circuit Judges

HAMLIN, Circuit Judge:

Norma C. Diric, petitioner herein, is a native and citizen of the Philippines. She is not a citizen or a national of the United States. She entered the United States on June 24, 1965, at Anchorage, Alaska, as a non-immigrant student under the provisions of 8 U.S.C. § 1101(a)(15) and was authorized to remain in the United States until June 15, 1966. She remained beyond that date and deportation proceedings were commenced against her. An order to show cause why she should not be deported was issued on October 11, 1966. On October 20, 1966, a hearing before a special inquiry officer was held. Petitioner was present without counsel.

During this hearing it was clearly established that she

had remained in the United States longer than authorized and that she was therefore deportable. During the course of the hearing the petitioner indicated that she did not want to leave the United States and that she would therefore like to make an application for a change of status to that of a permanent resident. The hearing was adjourned to give her an opportunity to file such an application.

When the hearing was resumed, on December 12, 1966, petitioner filed an application for permanent residence under the provisions of 8 U.S.C. § 1255.[1] She also requested that she be considered for voluntary departure under 8 U.S.C. § 1254(e).[2] Petitioner again appeared without counsel.

On December 15, 1966, the special inquiry officer denied petitioner's application for adjustment of status and found her ineligible for voluntary departure. He therefore ordered her deported to the Republic of the Philippines. Thereafter petitioner obtained counsel, and moved to reopen the proceedings. On January 23, 1967, the special inquiry officer denied the motion. Petitioner

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1. 8 U.S.C. §1255(a) provides: "The status of an alien . . . who was inspected and admitted or paroled into the United States may be adjusted by the Attorney General, in his discretion and under such regulations as he may prescribe, to that of an alien lawfully admitted for permanent residence if (1) the alien makes an application for such adjustment, (2) the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence, and (3) an immigrant visa is immediately available to him at the time his application is approved."

2. 8 U.S.C. §1254(e). "The Attorney General may, in his discretion, permit any alien under deportation proceedings, . . . to depart voluntarily from the United States at his own expense in lieu of deportation if such alien shall establish to the satisfaction of the Attorney General that he is, and has been, a person of good moral character for at least five years immediately preceding his application for voluntary departure under this subsection."

then appealed the order denying this motion to the Board, and on May 5, 1967, the Board ordered the appeal dismissed. It is from the latter order that appeal was taken to this court which has jurisdiction under 8 U.S.C. § 1105 (a).

The record establishes without question that the petitioner is deportable. In fact, counsel for petitioner does not contend otherwise. Petitioner does argue, however, that the denial of her petitions for relief under Section 1255 (adjustment of status) and Section 1254(e) (voluntary departure) was based upon improper evidence. We disagree.

During the hearing the trial attorney questioned petitioner concerning certain letters and statements that were in her immigration file. One such letter was from petitioner's aunt who had sponsored her arrival into the United States; another was from her father in the Philippines; and one was from her sister. These letters indicated that there was family disapproval of her conduct in the United States; particularly in regard to an alleged illicit relationship with a married man. Petitioner was asked if the statements contained in these letters were true. She in effect replied that some of them were and others were not. She was also asked whether she desired her aunt and uncle to be brought to the hearing to confront her. She replied that she didn't want to see them any more. The trial attorney also produced an affidavit made by the married man and asked petitioner whether she had any objection to it. She replied that she had no objection. The affidavit described the activities of petitioner and the married man in the United States while she was in his

employ; it specifically denied any misconduct on the part of petitioner.

In the course of the investigation by the Immigration and Naturalization Service, petitioner had made a statement to an investigator that while she was in the Philippines, prior to her arrival in the United States, she had been living out of wedlock with a married man, and that about four months before leaving the Philippines she had had an abortion. At the hearing she was asked whether she had made such a statement and whether it was true. She readily admitted that she had made the statement and that it was true.

We do not place our stamp of approval upon the type of procedure used at times by the trial attorney. He should have called witnesses to testify rather than merely ask petitioner if certain statements in their letters were true. Such shortcutting may deny a petitioner the opportunity to confront and cross-examine these witnesses and is therefore improper. If such improper evidence were the basis for the action of the special inquiry officer we would remand the proceedings for further hearing. However, even if all such testimony were disregarded or had not been admitted, there was still ample basis for the denial of discretionary relief.

Under Section 1255 petitioner must establish among other things that she is eligible for an immigrant visa and that an immigrant visa is immediately available to her. The record shows that she had no preference under the quota for the Republic of the Philippines, that the non-preference portion of the quota to which she was chargeable was oversubscribed and unavailable, and that

an immigrant visa was not therefore available. This in itself would prevent her from being statutorily eligible for adjustment of status.

Upon her request for voluntary departure, in addition to the requirement that she prove her good moral character, the regulations require that the applicant "has the immediate means to depart voluntarily from the United States." 8 C.F.R. 244.1. Petitioner testified that she had no money to pay her way back to the Philippines.

For both types of relief the burden was on the petitioner to establish a basis for such relief and to bring herself within the requirements of the statute. She produced no such evidence. The record before the special inquiry officer was devoid of any basis upon which favorable action could be taken. As stated in *Santos v. Immigration and Naturalization Service,* 375 F.2d 262, 264 (9th Cir. 1967), "The extraordinary discretionary relief provided in Section 245 of the Act can only be granted in *meritorious* cases; the *burden* is always upon the alien to establish that his application for such relief *merits favorable consideration.*"

Petitioner also argues that she was denied her right to counsel at the deportation hearing. Such right is granted by 8 U.S.C. §1252(b)(2).[3] We find no merit to this contention. The record shows that at the first hearing on October 20, 1966, the special inquiry officer advised petitioner that she had a right to be represented by counsel of her own selection and at no expense to the

3. 8 U.S.C. §1252(b)(2) provides that "the alien shall have the privilege of being represented (at no expense to the Government) by such counsel, authorized to practice in such proceedings, as he shall choose . . ."

government. She elected to proceed without counsel. Petitioner asserts that there was no similar instruction given at the second hearing on December 12, 1966. However, since the second hearing was merely a continuation of the first, the above instruction and waiver of counsel is clearly applicable. Moreover, the statute only requires that a petitioner be told of her right to counsel vis-a-vis a hearing on the issue of deportability. At the first hearing, the case for deportability was completely made out by the government; the second hearing was only to review petitioner's motions for discretionary relief. Thus, even if the waiver of counsel does not apply to the hearing on December 12, petitioner's right to counsel was not abused.

Petitioner further alleges that it was error for the special inquiry officer to deny her motion to reopen the hearing. This motion was made after petitioner had obtained counsel, and stated that she would, at a new hearing, come forward with evidence of her good moral character. The motion, however, made no statement that petitioner would be able to establish that an immigrant visa was immediately available, or that she had obtained funds sufficient to depart voluntarily. She could not, therefore, have benefited from the granting of the motion to reopen the hearing. We accordingly find no error in its denial.

Finally, petitioner argues that her statement and testimony was improperly admitted because she was not given a warning in keeping with *Miranda v. Arizona*, 384 U.S. 436 (1966). This was not a *Miranda*-type of questioning; petitioner was not in custody, and no criminal proceedings

were involved. We find nothing in *Miranda* or its progeny which would apply its exclusionary rule to deportation hearings.

A careful examination of the record in this case convinces us that petitioner has not established any basis for the setting aside of the order of deportation.

The order is therefore affirmed.

ELY, Circuit Judge (Concurring):

While I agree with the result reached in the majority opinion, I am not satisfied with the majority's gentle reprimand of the Government's trial attorney. I believe that we should have condemned his conduct in stronger terms. It distresses me that an alien must depart our country with the justified impression that the Government of the United States, through an over-zealous advocate, has been unnecessarily unkind, if not abusive.

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In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 1188

NORMA C. DIRIC, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A-15 to A-21) is reported at 400 F. 2d 658.

JURISDICTION

The judgment of the court of appeals was entered on September 19, 1968. A petition for rehearing was denied on October 30, 1968. Mr. Justice Douglas extended the time for filing a petition for a writ of certiorari to March 28, 1969, and on March 22, 1969,

the petition was filed. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioner, whose deportability is not contested, received a fair hearing on her application for adjustment of status or for voluntary departure.

STATUTES INVOLVED

Section 241(a)(2) of the Immigration and Nationality Act, 8 U.S.C. 1251(a)(2), provides:

> Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who—
>
> * * * *
>
> (2) entered the United States without inspection or at any time or place other than as designated by the Attorney General or is in the United States in violation of this chapter or in violation of any other law of the United States;
>
> * * * *

Section 101(a)(15) of the Immigration and Nationality Act, 8 U.S.C. 1101(a)(15), provides in pertinent part:

> The term "immigrant" means every alien except an alien who is within one of the following classes of nonimmigrant aliens—
>
> * * * *
>
> (F)(i) an alien having a residence in a foreign country which he has no intention of abandoning, who is a bona fide student qualified to pursue a full course of study and who seeks to enter the United States temporarily and solely for

> the purpose of pursuing such a course of study at an established institution of learning or other recognized place of study in the United States, particularly designed by him and approved by the Attorney General after consultation with the Office of Education of the United States, which institution or place of study shall have agreed to report to the Attorney General the termination of attendance of each nonimmigrant student, and if any such institution of learning or place of study fails to make reports promptly the approval shall be withdrawn, and (ii) the alien spouse and minor children of any such alien if accompanying him or following to join him;

Section 245(a) of the Immigration and Nationality Act, 8 U.S.C. 1255(a), provides:

> The status of an alien, other than an alien crewman, who was inspected and admitted or paroled into the United States may be adjusted by the Attorney General, in his discretion and under such regulations as he may prescribe, to that of an alien lawfully admitted for permanent residence if (1) the alien makes an application for such adjustment, (2) the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence, and (3) an immigrant visa is immediately available to him at the time his application is approved.

STATEMENT

1. On June 24, 1965, petitioner, a native and citizen of the Republic of the Philippines, entered the United States at Anchorage, Alaska, as a non-immigrant student (R. 35-36, 85, 87-88). The period for

which she was originally admitted was subsequently extended to June 15, 1966, to permit her to obtain practical training (R. 92, 95). On October 11, 1966, she was ordered to show cause why, in view of her overstay, she should not be deported (R. 85).

At a hearing before a special inquiry officer on October 20, 1966, petitioner was advised of her right to be represented by counsel, see 8 U.S.C. 1252(b)(2), but she responded that she did not wish to retain counsel (R. 33). It was shown that petitioner, who had become a medical nurse in the Philippines after sixteen years of schooling (R. 53; Pet. App. A-7), was permitted to enter the United States in order to attend the Seattle Dental Assistants and Technicians School. She completed this course on December 17, 1965 (R. 89-90). On March 21, 1966, she was admitted to the St. Joseph's Hospital School of Nursing, at Tacoma, Washington, to study psychiatric nursing (R. 93-98). On June 2, 1966, she applied for practical training in nursing in order to take the Washington state board and to remain in this country if the "Doctor's Association" was interested in keeping her (R. 98). Petitioner testified that she was unable to find employment with any dentist after she had completed her dental technician course (R. 52). On June 19, 1966, she started working for the South Park Nursing Home. Petitioner stated that the manager of the home had talked with Mr. Hutchins of the Immigration and Naturalization Service and obtained verbal permission for her to do this (R. 42). Petitioner said she had remained beyond her extended departure date of June 15, 1966, with the verbal per-

mission of Mr. Hutchins (R. 34-38). Hutchins testified that the question of petitioner's continued presence and employment in this country had arisen only in the course of a discussion of a possible application for adjustment of status under Section 245(a), 8 U.S.C. 1255(a).[1]

At that point, petitioner formally sought, for the first time, to apply for a change of status to permanent resident (R. 54). Although the trial attorney objected that this would be futile, since the quota for the Philippines was already oversubscribed, the hearing was adjourned to permit petitioner to make this application (R. 54-56).

2. On December 12, 1966, the hearing was resumed, and the special inquiry officer noted that petitioner had submitted an application for adjustment of status to that of a permanent resident, claiming preference as a trained nurse (R. 58-59). The trial attorney then sought to inquire into petitioner's qualification as a person of good moral character. It appeared from petitioner's answers and from letters

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[1] Hutchins testified that petitioner came to the office and presented a document from the St. Joseph's Hospital in Tacoma indicating that she should have practical training. On this, official action was withheld to permit petitioner to apply for a third-preference immigrant visa under Section 203(a)(3) of the Act, 8 U.S.C. 1153(a)(3) (Supp. III, 1965-67) (R. 49). He told petitioner that he would recommend denial of her application; she had never taken the practical training for which she had applied in connection with her dental course, and Hutchins advised her that psychiatric nursing would not qualify as a practical training project related to the dental courses which she had entered the United States to take. Petitioner never presented an application to extend her stay past June 15, 1966 (R. 50).

written by her father and by the aunt who had sponsored her entry and with whom she had lived for a while after arriving here, that arrangements had been made for petitioner to come to this country to get her away from a married man with whom she had been associating, an association that culminated in a criminal abortion shortly before she left. Her aunt and sponsor subsequently complained to immigration authorities that she no longer wanted anything to do with petitioner because she had become emotionally involved with the manager of the nursing home where she worked, also a married man (R. 64-75, 106-108). The trial attorney said that he was informed that the aunt had pneumonia, but that arrangements would be made for her presence if petitioner desired "to be confronted" with her aunt and uncle. Petitioner responded that "I don't want to see them anymore" (R. 79). The special inquiry officer, too, said that he did not desire to question the aunt (R. 81).

3. The special inquiry officer found that petitioner had undeniably overstayed the period for which she had been admitted to the United States and thus was deportable. He also determined that her application for adjustment of status had to be denied because she could not meet the initial requirement of the law as to availability of an immigrant visa, inasmuch as the third preference of the Philippine quota had already been exhausted. He added, further, that he would in any event have denied the application as a matter of discretion on the ground that petitioner was not a

bona fide non-immigrant at the time of her admission.[2] The privilege of voluntary departure was denied because of petitioner's failure to meet her burden of showing that she was a person of good moral character. Petitioner was ordered deported (Pet. App. A-5 to A-8).

3. Petitioner did not appeal from the deportation order within the statutory period. On January 13, 1967, however, petitioner moved through counsel to reopen the proceedings. She alleged that her waiver of counsel at the original hearing was not effective and that the record did not support the finding that she was not a bona fide non-immigrant at the time of her admission (Pet. App. A-10 to A-11). An affidavit of Dr. Keith Shaw as to petitioner's good moral character was submitted (R. 19-20). The special inquiry officer denied the motion, stating that it failed to show that the evidence was not available at the former hearing. He noted further that petitioner was unable to meet the statutory requirements for adjustment of status under Section 245 because she was not eligible for a third-preference visa at the time her application was considered (Pet. App. A-13 to A-14). The Board of Immigration Appeals dismissed an appeal from that order, concluding that petitioner had knowingly declined to exercise her right to counsel, and that she had failed to sustain her burden of establishing good

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[2] Although she had completed sixteen years of education in the Philippines and was qualified as a medical nurse, she had obtained her visa in the guise of a student dental technician. After she had completed her course she failed to take the practical training but went to work as a nurse with the intention of remaining in the United States permanently.

moral character. Citing Visa Bulletin No. 171, dated April 17, 1967, the Board also observed that the Philippine quota had been entirely allocated for the fiscal year, so that no purpose would be served in reopening the proceeding (Pet. App. A-9 to A-11).

4. The court of appeals affirmed. Both the opinion of the court and the concurring opinion of Judge Ely criticized the trial attorney for the procedure followed in challenging petitioner's character. But in view of the fact that petitioner was unable to qualify for an adjustment of status because the Philippine quota was oversubscribed, so that no immigrant visa was immediately available at the time of the application, the court found no prejudice (Pet. App. A-15-A-21).

ARGUMENT

1. The court below properly concluded that any impropriety in the administrative hearing did not affect petitioner's rights. She does not deny that she overstayed the period for which she had been temporarily admitted to this country as a non-immigrant student. It was this expiration of time allotted for her visit which formed the basis for the finding of deportability, not her involvement in immoral conduct.[3]

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[3] Petitioner raises, but does not argue, the question whether she was improperly denied voluntary departure (Pet. 2). Petitioner applied for the privilege of voluntary departure at her own expense, see 8 U.S.C. 1254(e), a form of relief that has different consequences from voluntary removal at government expense, see 8 U.S.C. 1252(b) and (g), 1182(a)(17). The regulations therefore appropriately provide that the type of voluntary departure petitioner sought will not be

Nor was the denial of her application for adjustment of status premised on the information developed about her conduct before and after entering this country. Section 245 of the Immigration and Nationality Act (8 U.S.C. 1255) is explicit in establishing as one prerequisite to adjustment of status, that an immigrant visa must be immediately available at the time the application is approved. The record in this case shows, however, that at the time of the application for adjustment, a visa was not available because the third-preference Philippine quota claimed by petitioner had been completely exhausted (Pet. App. A-7, A-11). Under these circumstances, as the Board of Immigration Appeals and the court of appeals concluded (Pet. App. A-11 to A-12, A-20) no purpose could have been served by reopening the case to inquire further into petitioner's moral character.[4]

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granted unless the alien can show he is financially able to carry through on his offer to leave voluntarily. 8 C.F.R. 244.1. Petitioner testified that she did not have such means (R. 53-54), and therefore her ineligibility for this form of discretionary relief did not turn critically on her moral character (see Pet. App. A-19).

[4] The possibly objectionable questioning of petitioner by government counsel was concerned with an *additional* factor relevant to adjustment of status: whether petitioner was the type of person to whom discretionary relief should be granted. It is well settled that petitioner, as the moving party, bore the burden of affirmatively demonstrating not only that such relief was statutorily available but also that it *should*, as a matter of discretion, be extended. *E.g.*, *Santos* v. *Immigration and Naturalization Service*, 375 F. 2d 262 (C.A. 9); *Chen* v. *Foley*, 385 F. 2d 929 (C.A. 6), certiorari denied, 393 U.S. 838; cf. *Jay* v. *Boyd*, 351 U.S. 345. In addition to the failure to satisfy this burden and to meet the statutory require-

2. The same point may appropriately be made in response to petitioner's claim that she was prejudiced by the absence of counsel: the services of a lawyer at the hearing could not have affected the statistical fact that there were simply more prior applicants for visas than allowed by the quota.[5] But in any event, petitioner was advised of her statutory right to appear with counsel, and chose not to do so.

Petitioner's reliance upon *Miranda* v. *Arizona*, 384 U.S. 436, is misplaced. That decision implements the privilege against self-incrimination by requiring the exclusion from a *criminal* trial of incriminatory statements obtained from a suspect who is "in custody" and who has not received full warnings of his right to remain silent and to have counsel. But as the court below held (Pet. App. A-20 to A-21), the constitutional premise for *Miranda* does not extend to the asking of relevant questions in a deportation hearing, especially on issues on which the alien bears the burden of proof.

3. None of the cases on which petitioner relies (Pet. 5-7) reveal any inter-circuit conflict on a question of law. None of the cases involves facts or issues similar to those presented in the present case. For example, in the only case from outside the Ninth Circuit, where

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ment of immediate availability of a visa, petitioner failed to meet still another test, since, as the special inquiry officer ruled, the objective evidence independently demonstrated that she was not a bona fide nonimmigrant at the time of her admission (Pet. App. A-7).

[5] Similarly, the presence of counsel could not have *improved* petitioner's financial situation so as to have made her a practical candidate for voluntary departure, see n. 3, p. 8, *supra*.

this case arose, the court of appeals merely ruled that the Board of Immigration Appeals erred in reversing the factual finding of a special inquiry officer, supported by substantial evidence, that the government had not proved the alien was a member of the communist party. It was in that context that the court observed, accepting the finding made by the special inquiry officer, that isolated hearsay was not sufficient to prove the critical element of deportability in that case. *United States ex rel. Brzovich* v. *Holton*, 222 F. 2d 840 (C.A. 7). In the instant case, petitioner does not deny deportability, and her application for discretionary relief was properly denied on grounds unrelated to the arguably improper questioning about the hearsay statements of others.

CONCLUSION

The petition for a writ of certiorari should therefore be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

WILL WILSON,
Assistant Attorney General.